# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 6, 2009 |
| v | No. 278247<br>Cass Circuit Court |
| JOSHUA WRAY WILLIAMS,<br><br>Defendant-Appellant. | LC No. 06-010273-FC |

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

This is a troubling case, brought over six years after the fact,[1] where the physical evidence demonstrated multiple assaults at different times; a victim who did not testify that defendant sexually assaulted her and who expressed fear of several of her other caregivers, including her own mother and father whose parental rights were later terminated; and where there is testimony that during the suspect time frame, she visited with an uncle who may have had a history of sexual assault. Given these facts, I conclude that the playing of a video recording of a police interview with defendant was not harmless error and that trial counsel's failure to prevent the playing of the DVD or at least to restrict its contents constituted ineffective assistance of counsel. I also conclude, under the facts of this case, that trial counsel's failure to present exculpatory expert medical testimony as to the nature of the injuries and the time frame in which they occurred constituted ineffective assistance of counsel. Accordingly, I respectfully dissent.

## I. The DVD Interview

Defendant concedes that his trial counsel failed to object to the contents of the DVD, thereby making this issue unpreserved. Unpreserved issues are reviewed for plain error affecting

[1] The record indicates that charges were not brought until defendant was involved in a custody dispute regarding his own daughter, the circumstances of which we have not been made aware. The record provides no other explanation for what precipitated the bringing of charges in this more than six year-old incident.

a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id.* at 763 (citations and internal quotations omitted).]

The DVD played for the jury by the prosecutor was a 65-minute excerpt of a police interview of defendant done in 2006.[2] In the course of that videotaped interview, Trooper Ambris made several remarks that related hearsay statements purportedly made by the victim and others. Some of these hearsay statements were identical to proposed testimony that the trial court had previously ruled was inadmissible. The jury heard these statements, recited by Ambris on the DVD, even though the trial court had already ruled that they could not be brought in through the social worker to whom they were said.

Of greater concern is the fact that Ambris's remarks also included descriptions of purported statements that were highly incriminating to defendant, but which do not appear elsewhere in the record and, as far as I can determine, were invented by the officer for purposes of trying to obtain a confession. The jury heard the following statements in this category:

1. That the victim's younger sister, who was only two at the time, told someone that defendant hit the victim when she soiled her pants;

2. That the victim said that defendant told her to touch his penis and she did so;

3. That the victim said defendant told her he would come back and kill her if she told anyone what happened; and

4. That the victim may have been trying to protect her younger sister from assault by defendant.[3]

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[2] I note that defendant was not given warnings pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), prior to this interview that was conducted at the police station, but that is not an issue in this appeal.

[3] The record does not contain any other reference to an attack or attempted attack on the victim's younger sister.

The jury was permitted to consider, for any purpose, these highly prejudicial and possibly untrue hearsay statements that had no basis in the record.

In addition, Ambris made remarks during the interview vouching for the credibility of these purported statements. However, some of Ambris's statements buttressing the hearsay appear to have been untrue. The officer stated that:

> 1. "[t]here was nobody else there," when in fact the victim's mother was alone with her from about midnight until about 7:00 a.m.
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> 2. the victim "never brings anybody's name but yours constantly," when the evidence showed the victim was afraid of her mother and father and that she said that her mother "hurt her the most." In addition, there was no evidence that the victim mentioned defendant's name any time other than the conversation with the social worker five years before the police interview on the DVD.
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> 3. the victim's "stories haven't changed from back then to now and what's bad is the stories don't change. You'd think that after six years she'd change a bit of the stories, but they don't." In fact, the victim's description of events varied substantially. At the hospital she told the nurse that she was injured falling off a couch, she later provided a social worker descriptions of a sexual assault, while at trial she did not describe a sexual assault, but rather that defendant put ice in her diaper and put her head under water.
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> 4. "[w]e know it happened that night," when the testimony of the doctors provided a range of time that included, but did not limit the assault to, that evening and the doctors agreed that there were bruises of differing ages. Further, the medical testimony regarding the sexual assault was that it could have occurred within the prior two or even four weeks.

These one-sided assertions, spoken as definitive conclusions by a police officer to the jury, declared as fact that defendant was guilty, the evidence proved him so, and that there was no doubt about that evidence. Not only were these statements improper vouching for the credibility of the victim, see *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), but they impermissibly and prejudicially preempted the jury's fact-finding function.

In sum, by showing the DVD, the jury heard a series of highly prejudicial statements that ranged from inadmissible double hearsay to inaccurate statements and statements without any record support. In addition, the jury heard Ambris repeatedly state his opinion of the high credibility of the statements and make false statements about the consistency of the victim's statements. Not only was it error for the jury to hear these statements, but the errors carried with them too great a likelihood of affecting the integrity of the truth-finding process to not conclude that this plain error "seriously affected the fairness, integrity or public reputation of judicial proceedings" regardless of whether this error resulted in the conviction of an actually innocent defendant. *Carines, supra* at 763.

I do not see how it can be reasonably concluded that Ambris's statements would not have had a significant effect on the jury. Further, his concession that he "puffs up" facts during interrogation was insufficient to eliminate the prejudicial quality of the statements. Indeed, he

testified that he did not recall puffing up facts in this case. Therefore, the prejudice of these statements was not removed. Additionally, trial counsel's attempts to impeach Ambris in this area only exacerbated the problem. Trial counsel only referenced two examples, one of which Ambris testified was not an example of puffing, and neither of which referenced any of the problematic areas of testimony that were otherwise unsupported by the record. The result of this questioning likely left the jury with the impression that because defendant's trial counsel did not try to correct Ambris's testimony on issues such as whether the victim had said defendant would kill her, or that the victim only referenced defendant's name, those were not instances of puffing or were things that the officer could prove. Reversal is warranted. *Carines, supra*.

Further, trial counsel was ineffective for failing to seek to prevent admission of the DVD or at least to restrict its contents. To prevail on a claim of ineffective assistance of counsel, defendant is required to show that trial counsel's performance was objectively unreasonable, and that he suffered prejudice as a result, in that there is a reasonable probability that the outcome of the trial would have been different but for trial counsel's errors. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

It is unclear if defendant's trial counsel viewed the tape before it was shown to the jury, but either way, he failed to act as effective counsel. Although this Court will "not substitute its judgment for that of counsel regarding matters of trial strategy," *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002), there can be no trial strategy in failing to review DVD. Similarly, if trial counsel did review it, he either should have moved to exclude it or, if there were tactical reasons to allow some of it to be played, at a minimum requested redaction of the hearsay and other improper statements by Ambris. While any individual failure to object, redact, or request a limiting instruction might by itself reflect trial strategy, the three together reflect a complete absence of counsel. The inflammatory and prejudicial nature of Ambris's statements in the interview lead to the conclusion that if the DVD had not been admitted, the inadmissible statements edited out, or even the jury given some type of limiting instruction, there is more than a reasonable probability that the trial outcome would have been different. *LeBlanc, supra.*

II. Expert Testimony

Defendant also argued ineffective assistance of counsel based on counsel's failure to present expert medical testimony to rebut the prosecution's experts. This Court remanded the matter back to the trial court for a *Ginther*[4] hearing. *People v Williams*, unpublished order of the Court of Appeals, entered January 14, 2008 (Docket No. 278247). At the hearing, defendant's trial counsel testified that he waived the preliminary examination in the case, at least in part, because he did not want the victim to testify prior to trial. He testified that he never requested more information than what the prosecution offered to him and that he did not research or request information from anyone regarding signs or indicators of vaginal and rectal penetration. The prosecution's witnesses were brought to his office for his convenience, but the only doctor he remembered talking to was the gynecologist, and their conversation was only half an hour to

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1993).

an hour. He did not review the evidence from the ER with anyone with medical training or someone who could explain the terminology to him.

Trial counsel further testified that his cross-examination of both the ER doctor and the gynecologist focused on only the ages of the bruising because "to be fair I assumed there was penetration." However, he conceded that he had no specialized knowledge or information about the ages of the bruising and had not attempted to get any. He did not ask questions of either of the doctors as to whether falling on a wood frame of a couch could cause some or all of the pictured injuries. He agreed that Dr. Schappa's testimony that the anal abrasion was not even specific for anal penetration would have helped his case and that medical testimony was the core of and essential to his defense. Trial counsel further testified that there was no specific reason for his failure to present medical evidence. Rather, he had never thought that defendant "did it, and so it seemed to me somebody else must have done whatever has happened." When asked whether he specifically decided not to investigate the issue further, trial counsel replied, "I think to a large degree it did not occur to me." Trial counsel also admitted that he relied on the gynecologist's original testimony regarding the ages of the bruises so that when she retracted those statements at trial, it was "problematic" for his defense, particularly because he did not have an independent expert of his own to support the defense he was relying on. Although trial counsel testified that his choice not to disprove sexual assault was a "strategy" designed to prevent a battle of experts, he admitted that if he had had positive evidence that the victim had not been sexually assaulted, he would not have "strategically ignored" the evidence.

The trial court denied defendant's request for a new trial, concluding that defendant's case did not "hinge" on medical testimony. The trial court noted:

> [Trial counsel] further admitted on cross-examination during the *Ginther* hearing that he chose the strategy of attempting to create reasonable doubt as to who did sexually abuse the victim because (1) he never questioned that there was actual sexual penetration of the victim given the evidence, and (2) when you have evidence of numerous injuries to a young victim and testimony by a credible medical expert regarding those injuries, attempting to discredit the injury can and often does backfire.

These holdings establish the unreasonableness of trial counsel's actions. First, trial counsel never questioned whether there was actual sexual penetration, testifying that he simply "assumed there was penetration." Trial counsel testified that when he looked at the pictures, he thought that the victim had been sexually molested and never researched whether the medical evidence was consistent with rectal and vaginal penetration or hired his own medical expert to review the evidence. He did not speak to anyone at the hospital about the examination of the victim and did not review the notes from the examination with anyone who "might have information about what the terms mean." He relied solely on a single conversation with Dr. Harrison, one of the prosecution's witnesses, which lasted between 30 minutes and an hour. He never spoke with the prosecution's other testifying medical expert.[5] By failing to do any of these things, defendant's

[5] In this regard, one of the trial court's findings of fact is clearly erroneous. The trial court stated

trial counsel abandoned a possible defense, i.e., that no sexual molestation had occurred, without *any* investigation whatsoever. This is not a lack of strategy regarding just any issue, but rather a lack of strategy on the central issue of whether a sexual assault actually occurred. In addition, the question of whether a sexual assault occurred in this case was beyond lay knowledge because it relied completely on circumstantial evidence that required medical interpretation.

"Constitutionally effective counsel must develop trial strategy in the true sense—not what bears a false label of 'strategy'—based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation." *Ramonez v Berghuis*, 490 F3d 482 (CA 6, 2007). Consequently, trial counsel was not permitted to rely solely on his belief that the pictures evidenced sexual molestation. He had a duty to determine whether that was, in fact, what the evidence showed, before he made the "strategic" decision to forgo a "battle of the experts" based on his experience that such a strategy is not effective.

Notably, the Sixth Circuit, relying on United States Supreme Court and other federal appeals court opinions, has found ineffective assistance of counsel for failure to investigate in a situation even where an attorney *did* hire an expert independent of the prosecution. *Richey v Bradshaw*, 498 F3d 344, 363 (CA 6, 2007). In *Richey*, the defendant's trial counsel hired an independent expert to review the conclusions of the State's experts. *Id.* at 347. The independent expert, who "did not have any special expertise in arson investigation and little arson-related training," met with one of the State's experts to review the forensic evidence and have the State's expert explain his conclusions. *Id.* at 347-348. Based solely on that meeting, the independent expert reported agreement with the State's experts' conclusions that the fire was caused by arson. *Id.* at 348. The defendant's trial counsel did not question the independent expert about his investigation or why he agreed with the state, but relied on his opinion to abandon the defense that there was no arson. *Id.* The Sixth Circuit concluded that this was ineffective assistance of counsel:

> The point is not that [trial counsel] has a duty to shop around for another expert who would refuse the conclusions of [trial counsel's independent investigator] and the State's experts. The point is that [trial counsel] had a duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion. See *Rompilla v Beard*, 545 US

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that "the prosecution had the findings of two medical experts . . . who defendant's trial counsel met with and found to be credible." Trial counsel testified that he only met with one of the experts prior to trial and made no statements regarding their credibility. Rather, he testified that hearing them testify reaffirmed in his mind his belief that there had been a sexual assault. Accordingly, the record does not support the trial court's finding.

Additionally, the prosecutor spent some time discussing trial counsel's prior experience as a defense attorney. This is irrelevant to the question of effective assistance of counsel. *People v Grant*, 470 Mich 477, 497; 684 NW2d 686 (2004) (holding that a trial counsel's previous experience in criminal defense, as well as the fact that he spent more time than usual on a case were "irrelevant to assessing the performance of his duties in this case"). Although the trial court's opinion makes no reference to this testimony, it is difficult to know whether it had any effect on the trial court's determination.

> 374, 387; 125 S Ct 2456; 162 L Ed 2d 360 (2005) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and the penalty in the event of conviction." (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1992 Supp.)). Having simply been served up with [the independent investigator]'s flat agreement with the State, and not having known either what [the independent expert] did to arrive at his conclusion or why he came our where he did, [trial counsel] was in no position to make this determination. . . . *Driscoll v Delo*, 71 F3d 701, 709 (8th Cir 1995) (holding that even where defense counsel elicited a concession from the state's expert that whether a particular blood type was on the knife was entirely speculative, defense counsel was defective for having failed to take measures "to understand the laboratory tests performed and the inferences that one would logically draw from the results"); *Dugas v Coplan*, 428 F3d 317, 328 (1st Cir. 2005) (holding that where defense counsel visually inspected the fire scene himself, talked with the state's experts, did some limited reading, and talked with other defense attorneys, he nonetheless failed to adequately investigate an available "no arson" defense). [*Id.* at 363.]

The Court went on to say that it was insufficient for trial counsel "to attempt to poke holes in the State's . . . case by focusing on the identity of [the perpetrator]. At the very least, . . . the defense's failure to point the finger at any other possible culprit, made such a choice unreasonable." *Id.*

The circumstances in this case are extremely similar. Instead of an independent expert, defendant's trial counsel spoke with only one of the prosecution's experts. Acting only on the basis of that conversation and his own review of the forensic evidence, which he admitted he was not medically competent to perform, trial counsel then concluded that penetration had occurred and dropped the defense that there was no penetration without being in any position to make this determination. Defendant's trial counsel then attempted to "poke holes" in the prosecution's case by "pointing the finger" at the uncle. However, this defense was completely destroyed because trial counsel relied solely on the pre-trial representations of the examining gynecologist that the injuries could have occurred as far back as four weeks prior to the exam. When this prosecution witness changed her testimony at trial that the injuries could have only occurred within the prior two weeks, trial counsel had no medical witness of his own to counter her testimony. As in *Richey*, there was no longer "any other possible culprit," making trial counsel's decision not to hire a medical expert "unreasonable." *Id.* Accordingly, defendant's trial counsel was ineffective.[6]

[6] The majority attempts to minimize trial counsel's failure to carry out an independent investigation with the fact that "Harrison and Gear were not prosecutorial experts who were paid to examine the victim and then testify at trial." It makes absolutely no difference whether the prosecution's experts are paid or otherwise. The fact that the prosecutor's experts were "medical personnel who happened to be working on the day the victim was brought in for examination" did not relieve counsel of his obligation to conduct an independent investigation.

The trial court also determined that the medical expert's testimony did not deprive defendant of a substantial defense, in part, because:

> At best, if the testimony of Dr. Schappa had been presented during defendant's trial, it would have merely created a battle between the experts over medical issues that were not pertinent to [trial counsel]'s chosen trial strategy . . . . This battle between the experts would not have added much, if anything, to [trial counsel]'s strategy of creating reasonable doubt as to who sexually abused the victim and would have probably actually drawn the jury's attention *away* from this defense.

This misunderstands Dr. Schappa's testimony in two ways. First, as already discussed, this was not an expert battle over a collateral matter, but the main issue. Second, Dr. Schappa's testimony spoke not only to if, but when, any sexual assault occurred. Trial counsel's chosen defense was that given the age of the injuries, defendant was not the person who injured the victim. Thus, this would not have been experts battling over some peripheral issue, but over the most important issue of the case—whether defendant could have caused the injuries.

Dr. Schappa testified that it would take an anal laceration one to two weeks to heal, not a matter of days, and that he would have characterized "some bruising to the buttocks into the back" as being "probably more than 14 days old." He also testified that if the trauma to the vaginal area had been acute, meaning it had occurred within 12 or 24 hours, the victim would likely have been experiencing discomfort when urinating. Thus, because she had no such discomfort, the trauma was, in his view, likely older than 24 hours. This testimony goes to the heart of trial counsel's chosen defense. The fact that these injuries were older and healing indicated that they occurred *before* the babysitting incident, made it more likely that someone other than defendant committed the sexual assault.

The trial court here appears to have "simply observed in a perfunctory fashion" that Dr. Schappa's testimony would not have changed the trial's outcome. See *Ramonez*, *supra* at 489. This is an improper usurpation of the jury's determination of witness credibility. *Id.* at 490. "Even though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies . . ., there certainly remained a reasonable probability that they jury would not have. [The defendant]'s case was therefore prejudiced where their testimony would have helped corroborate his testimony and contradict that of [the] complaining witness . . . ." *Id.* at 491. Given that Dr. Schappa's testimony made it more likely that someone else committed any sexual assault of the victim that occurred, trial counsel's failure to investigate and call a rebuttal expert witness presents a reasonable probability that the trial outcome would have been different. *LeBlanc*, *supra.*

Moreover, contrary to the trial court's assumption, Dr. Schappa's proposed medical testimony that there was no penetration did not require the defense to argue that no sexual molestation occurred. Defendant was charged with CSC I, which requires penetration. Even if there was evidence that defendant otherwise sexually molested or beat the victim, evidence that disproved penetration eliminated one of the required elements for CSC I. Given that the victim did not testify that any penetration occurred, I "can discern no strategic reason why counsel would have so readily ceded this terrain to the prosecution." *Richey*, *supra* at 363.

Trial counsel's failure to investigate whether penetration occurred and whether the injuries were consistent with the time frame offered by the prosecution and his failure to call a rebuttal medical expert witness were objectively unreasonable and prejudiced defendant, as those failures destroyed the only defense trial counsel pursued. There is a reasonable probability that the outcome of the trial would have been different but for trial counsel's errors. *LeBlanc*, *supra*.

III. Other Issues

Because the above reasons are sufficient to require a new trial, I have not addressed the remainder of defendant's issues. However, there are two claims by the majority that I wish to address.

First, related to the challenged other-acts evidence, the majority describes the incident as defendant taking "advantage of another young victim when she was entrusted to his care as the baby-sitter, when other adults and children were not present and he was alone with the victim in a private location." I believe that this description permits the inference that the evidence was far more similar to the present allegation than it really was, as the other incident occurred four to five years later and involved defendant "touching the outside of the clothing" on the chest of a girl that was six years older than the victim in the present case. This incident, while troubling, is simply not similar enough to the allegations in this case to lend itself to the conclusion that defendant had a motive, intent or scheme.

Second, the majority concludes that testimony that the victim was placed in foster care after the incident was not hearsay because it was not admitted for the truth. The majority reasons that the testimony "was not admitted for its truth" but instead "to impeach defendant's testimony that he saw the victim after the incident." In order to impeach defendant's testimony, it had to be taken as true. Thus, it was explicitly admitted for the truth of the matter asserted and, therefore, constituted hearsay.

Finally, as noted at the outset of this opinion, I do not see how these errors can be considered harmless in the context of this case. The physical evidence demonstrated multiple assaults at different times on different areas of her body, the victim did not testify that defendant sexually assaulted her,[7] the victim expressed fear of several of her other caregivers, including her own mother and father whose parental rights were later terminated, and there was testimony that during the suspect time frame, she visited with an uncle who may have had a history of sexual assault.

For all of the above reasons, I conclude that defendant was denied his right to a fair trial and would reverse his conviction and remand the case for a new trial.

/s/ Douglas B. Shapiro

[7] Defendant was not charged with any non-sexual assaultive crime.